EDITOR'S NOTE

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RESPONSE REQUESTED

ORIGINAL

No. 87-6703

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DOUGLAS VINCENT METHENY,

Petitioner,

v.

M.C. HAMBY, Warden, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an alleged violation of the trial-before-return provision of Article IV(e) of the Interstate Agreement on Detainers, in the absence of any allegation or proof that the violation harmed the defense in any way, can constitute a "fundamental defect" in the prosecution which justifies the extraordinary relief of habeas corpus under 28 U.S.C. § 2254.

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The opinion of the United States Court of Appeals for the Sixth Circuit in this case is now published at 835 F.2d 672. A copy is attached as Appendix A.

The order of the United States District Court for the Middle District of Tennessee adopting the report and recommendation of a magistrate, and the report and recommendation itself, are not published. Copies are attached as Appendices B and C to this brief.

The opinion of the Tennessee Court of Criminal Appeals affirming the petitioner's convictions on direct appeal is published at 589 S.W.2d 943. A copy is attached as Appendix D.

JURISDICTION

This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1). Docketing of the petition appears to have been timely under 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Petitioner was charged with first-degree burglary and armed robbery in Anderson County, Tennessee in January 1977, and was captured by federal officers in Mississippi in March 1977. He was also charged with a federal offense, and was brought to the Eastern District of Tennessee.

Pursuant to the writ of habeas corpus ad prosequendum issued by the Anderson County Criminal Court, petitioner was brought there for a preliminary hearing on May 13, 1977. Shortly thereafter he was convicted of the federal charge and transported to a federal prison in Kansas to serve his sentence.

In July 1977 petitioner was returned to Anderson County by federal authorities pursuant to a second writ of

habeas corpus ad prosequendum, and he was indicted and arraigned. Petitioner's counsel requested that trial be set several months later to allow petitioner to undergo surgery. Petitioner was then returned to the federal prison.

Petitioner's counsel subsequently moved to dismiss the indictment on the ground that he had not been tried when brought to the state court, in violation of Article IV(e) of the Interstate Agreement on Detainers (IAD), Tenn. Code Ann. § 41-31-101. The state trial court denied the motion, finding that its writs of habeas corpus ad prosequendum were not "detainers" under the IAD.

Petitioner was brought back to Anderson County on a third writ of habeas corpus ad prosequendum to stand trial in July 1978. He was convicted of first-degree burglary and armed robbery, and was further found to be an habitual criminal and given a life sentence. At no time was a detainer filed under the IAD; each time petitioner was returned to Anderson County, it was on the basis of a writ of habeas corpus ad prosequendum.

In his direct appeal to the Tennessee Court of Criminal Appeals petitioner did not challenge the sufficiency of the convicting evidence. Among the legal issues raised was his IAD claim, which was denied on the basis of this Court's decision in United States v. Mauro, 436 U.S. 340 (1978). Metheny v. State, 589 S.W.2d 943, 945 (Tenn. Crim. App.), cert. denied id. (Tenn. 1979), cert. denied 445 U.S. 967 (1980). State post-conviction proceedings resulted in the denial of relief, and the instant petition for habeas corpus under 28 U.S.C. § 2254 was filed in the district court in January 1984.[1]

After an evidentiary hearing before a magistrate, he recommended dismissal of the petition. The magistrate found the

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[1]Earlier federal petitions had been filed, but were dismissed on procedural grounds.

IAD issue to be cognizable as an issue of federal law, citing Carchman v. Nash, 473 U.S. 716, 719 (1985). App. C-11 - C-12. On the merits, however, the magistrate found on alternative grounds that no IAD violation had occurred. The district court adopted the report and recommendation without comment, and dismissed the petition. App. B.

The court of appeals affirmed, but on the ground that the IAD violation alleged by the petitioner was not cognizable under 28 U.S.C. § 2254. The court reaffirmed that a violation of the trial-before-return provision of IAD art. IV(e) does not constitute a "fundamental defect" in the prosecution justifying habeas corpus relief, at least not "in the absence of exceptional circumstances." 835 F.2d at 675.

Again, no detainer was ever issued to obtain the petitioner's presence in Anderson County. Moreover, petitioner has never alleged at any point in these proceedings that the failure to try him the first two times he was brought to Anderson County resulted in any prejudice to his ability to defend himself in July 1978.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THIS CASE DOES NOT PROPERLY PRESENT THE ISSUE OF WHETHER IAD CASES ARE COGNIZABLE, AS NO DETAINERS WERE FILED AND THE IAD DID NOT APPLY TO THE CASE.

The petitioner has presented his claim, and the Sixth Circuit treated it, as an issue arising under the Interstate Agreement on Detainers (IAD). Without addressing the merits, the Sixth Circuit determined that even a facially valid claim of an IAD violation, in the absence of an allegation of prejudice, cannot justify habeas corpus relief and is therefore not cognizable. However, a review of the petitioner's claims demonstrates that this is not an IAD case at all, and would

therefore be an inappropriate vehicle for the determination of the cognizability issue presented by the petitioner.

The petitioner's primary claim below was that he was thrice brought to Anderson County on writs of habeas corpus ad prosequendum, but was not tried until the third time. He contended that the writs were "detainers" under the IAD, and that his return without being tried violated art. IV(e) thereof.

In fact, this Court examined in 1978 the issue of whether writs of habeas corpus ad prosequendum are "detainers," and answered in the negative. United States v. Mauro, 436 U.S. 340 (1978). Thus this case is not even a case falling under the IAD, and does not provide the necessary predicate for consideration of the issue of whether IAD cases are cognizable.

This conclusion is not altered by the fact that the magistrate analyzed the merits anew, on the basis of his concern that Mauro did not control cases in which state writs are issued to federal prison authorities.[2] First, as the magistrate demonstrated, the Mauro analysis leads to the same result in the case of state writs. App. C-11 - C-20. Second, even assuming that state writs are not binding on federal authorities, they are not thereby converted to "detainers," but instead are merely void. The fact that a defendant is brought within a court's jurisdiction on a void writ that has been honored nonetheless, or by some other illegal means outside the IAD, has no effect on the jurisdiction of the court to try and convict the defendant. Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 444 (1886).

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[2]Other courts had held since Mauro that the nonbinding nature of state court writs is irrelevant. See, e.g., Commonwealth v. Florence, 7 Mass. App. 126, 387 N.E.2d 152, 153 (1979); State v. Boone, 40 Md. 41, 388 A.2d 150, 151 n. 3 (1978).

The petitioner also raised in the district court and court of appeals an alternative argument which was not expressly addressed in any of the opinions, but which has no effect on the above analysis. He contended that the original state arrest warrant, which simply charged him with the offenses and commanded his arrest, was actually a "detainer." If so, then the subsequent writs of habeas corpus constituted "written requests" triggering IAD art. IV. Mauro, 436 U.S. at 361-365.

However, it is clear that a mere arrest warrant cannot be a "detainer" triggering the IAD. A "detainer" has been defined as a notice to prison officials that charges are pending against an inmate, and requesting notification to the sender before the inmate is released. Ridgeway v. United States, 558 F.2d 357, 360 (6th Cir. 1977), cert. denied 436 U.S. 946 (1978). The arrest warrant was not a notice of pending charges, as no charges were pending when the warrant was drawn. Neither did the warrant purport to request notification of release; rather, it demanded arrest. Finally, a "detainer" may be lodged by a prosecutor or law enforcement officer, Mauro, 436 U.S. at 358, while a Tennessee arrest warrant may be issued only by a magistrate or clerk, Tenn. R. Crim. P. 4(a). Therefore, the petitioner's arrest warrant argument does not bring this case within the IAD any more than his writ argument.

If the Court wishes to resolve the cognizability issue, therefore, it should await a case in which a true IAD issue has been raised, rather than a non-IAD case such as this.

II. IN ANY EVENT, THE SPLIT AMONG THE COURTS OF APPEALS ON IAD COGNIZABILITY IS NOT SUBSTANTIAL ENOUGH TO REQUIRE RESOLUTION BY THIS COURT.

The issue in this case is relatively narrow. The respondents do not contest that the Interstate Agreement on Detainers is a "law[] . . . of the United States" authorized by the Compact Clause and therefore subject to interpretation by federal courts in a habeas corpus proceeding. Carchman v. Nash,

473 U.S. 716, 719 (1985); see Cuyler v. Adams, 449 U.S. 433, 438-442 (1981). Instead, the respondents contend and the Sixth Circuit held that a violation of the trial-before-return provision of IAD art. IV(e), in the absence of a specific showing of prejudice, cannot constitute a

> fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

Hill v. United States, 368 U.S. 424, 428 (1962) (citations omitted). This issue is termed an issue of "cognizability" as opposed to jurisdiction, as it relates primarily to whether relief will be granted if a violation is found.

In this context, the respondents contend that the split of authority relied upon by the petitioner is relatively insubstantial, and does not merit review by the Court.

A. The Existence of the Split

The split of authority on the cognizability of IAD violations in habeas corpus cases is largely illusory. The following list catalogs those courts of appeals which have agreed with the Sixth Circuit and held that violations of the trial-before-return provisions of the IAD are not cognizable, in the absence of a specific showing of resulting prejudice. Each citation indicates which habeas corpus statute and IAD provision(s) were involved.[3]

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[3]This Court has conclusively held that the habeas corpus remedies relating to state and federal convictions, 28 U.S.C. §§ 2254 and 2255, respectively, are "identical in scope." Davis v. United States, 417 U.S. 333, 343-344 (1974); Hill v. United States, 368 U.S. 424, 427 (1962); United States v. Hayman, 342 U.S. 205 (1952).

FIRST CIRCUIT: Fasano v. Hall, 615 F.2d 555, 557-558 (1st Cir.), cert. denied 449 U.S. 867 (1980) (28 U.S.C. § 2254 case, alleged violations of IAD art. III(d) trial-before-return provision and art. III(a) trial-in-180-days provision); Martens v. Shannon, 836 F.2d 715, 718 n. 4 (1st Cir. 1988) (§ 2254, art. III(a) trial-in-180-days).

SECOND CIRCUIT: Edwards v. United States, 564 F.2d 652 (2nd Cir. 1977) (§ 2255, art. IV(e) trial-before-return); Foran v. Metz, 463 F.Supp. 1088, 1096 (S.D. N.Y.), aff'd without opinion 603 F.2d 212 (2nd Cir.), cert. denied 444 U.S. 830 (1979) (§ 2254, art. III(a) and IV(c) 180-day and 120-day provisions).

FOURTH CIRCUIT: Bush v. Muncy, 659 F.2d 402, 407-409 (4th Cir. 1981), cert. denied 455 U.S. 910 (1982) (§ 2254, art. III(d) and IV(e) trial-before-return); Kerr v. Finkbeiner, 757 F.2d 604 (4th Cir.), cert. denied 474 U.S. 929 (1985) (§ 2254, art. III(a) trial-in-180-days).

FIFTH CIRCUIT: Sassoon v. Stynchombe, 654 F.2d 371, 374-375 (5th Cir. 1981) (§ 2254, art. IV(e) trial-before-return).[4]

SIXTH CIRCUIT: Mars v. United States, 615 F.2d 704, 706-707 (6th Cir.), cert. denied 449 U.S. 849 (1980) (§ 2255, art. IV(e) trial-before-return; with dicta applying to art. IV(c) trial-in-120-days provision, 615 F.2d at 705 n. 5); Metheny v. Hamby, 835 F.2d 672 (6th Cir. 1987) (§ 2254, art. IV(e) trial-before-return);

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[4]But cf. Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985), in which § 2254 habeas relief was granted for a two-and-one-half-year violation of art. III(a) (trial-in-180-days). The opinion does not mention cognizability or cite Davis, suggesting that the issue was not even raised by the parties. Neither does the opinion cite Sassoon, and could hardly be considered to have overruled it.

Gri[illegible]ll v. Tennessee, 601 F.Supp. 230, 231 (M.D. Tenn.), appeal dismissed 746 F.2d 1476 (6th Cir. 1984) (§ 2254, art. III(a) trial-in-180-days).

EIGHTH CIRCUIT: Huff v. United States, 599 F.2d 860 (8th Cir.), cert. denied 444 U.S. 952 (1979) (§ 2255, art. IV(e) trial-before-return); Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.), cert. denied 462 U.S. 1135 (1983) (§ 2241 pretrial, art. IV(d) pretransfer hearing, writ granted by 2-1 decision based on express finding of "exceptional circumstance");[5] Shigemura v. United States, 726 F.2d 380, 381 (8th Cir. 1984) (§ 2255, art. IV(e) trial-before-return).

NINTH CIRCUIT: Hitchcock v. United States, 580 F.2d 964, 966 (9th Cir. 1978) (§ 2255, art. IV(e) trial-before-return); United States v. Boniface, 601 F.2d 390, 394 (9th Cir. 1979) (§ 2255, art. IV(e) trial-before-return); Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983) (§ 2254, art. IV(e) trial-before-return).

TENTH CIRCUIT: Greathouse v. United States, 655 F.2d 1032, 1034 (10th Cir. 1981), cert. denied 455 U.S. 926 (1982) (§ 2255, art. IV(e) trial-before-return).

ELEVENTH CIRCUIT: Sassoon v. Stynchombe, 654 F.2d 371, 374 (5th Cir. 1981) (§ 2254, art. IV(e) trial-before-return).[6]

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[5]Cavallaro has also been distinguished on the ground that it was brought before the state court trial had been held, and thus did not involve the overturning of a conviction. Shack v. Attorney General of Pennsylvania, 776 F.2d 1170, 1173 (3rd Cir. 1985), cert. denied 475 U.S. 1030 (1986).

[6]Sassoon was decided on August 28, 1981, and thus is binding precedent in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981); Florida v. Royer, 460 U.S. 491, 505 n. 10 (1983). In fact, Sassoon has been relied upon by the Eleventh Circuit for one of its other holdings. Booker v. Wainwright, 703 F.2d 1251, 1255 & n. 8 (11th Cir.), cert. denied 464 U.S. 922 (1983).

The petitioner cites a Ninth Circuit decision as representing "the middle ground." Pet. at 10. In fact, the Ninth Circuit has found to be cognizable only those cases involving one of the time provisions of the IAD, having found those provisions to have roots in the speedy trial guarantee of the Sixth Amendment. Carlson, supra, 707 F.2d at 368; Cody v. Morris, 623 F.2d 101, 102-103 (9th Cir. 1980) (§ 2254 case, art. IV(c) trial-in-120-days); Brown v. Wolff, 706 F.2d 902, 905-906 (9th Cir. 1983) (§ 2254, art. III(a) trial-in-180-days); Tinghitella v. California, 718 F.2d 308, 310-311 (9th Cir. 1983) (§ 2254 case, art. III(a) trial-in-180-days); Johnson v. Stagner, 781 F.2d 758 (9th Cir. 1986) (§ 2254 case, art. III(a) trial-in-180-days).[7] The above catalog shows that other courts of appeals disagree with respect to the time provisions. But since the instant case does not involve either of the time-specific IAD provisions, it does not present that split for resolution.

We next review those courts of appeals cited by the petitioner as contrary to the majority position.

SEVENTH CIRCUIT. In Echevarria v. Bell, 579 F.2d 1022, 1024-1025 (7th Cir. 1978), the court took cognizance of the alleged IAD violation (art. IV(e) trial-before-return) in a § 2254 case simply upon finding that the IAD is a "law[] . . . of the United States" under § 2254(a) without further analyzing whether the petitioner had alleged a "fundamental defect" in the prosecution. In Webb v. Kechane, 804 F.2d 413 (7th Cir. 1986), the court simply followed Echevarria. Moreover, in both cases the court found other procedural bars to granting the writ of habeas corpus, rendering academic the "fundamental defect" question.

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[7]The distinction between the policies and roots of the different IAD provisions was also recognized by the Ninth Circuit in United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979), which held that the trial-before-return provisions are waivable based partly on their nonconstitutional foundations.

A district court in the Seventh Circuit found the issue to be undecided there, and granted the writ for an art. IV(c) 120-day violation after an extensive analysis of the Davis "fundamental defect" doctrine. However, the decision was reversed for a procedural default, and the writ was ultimately denied. United States ex rel. Holleman v. Duckworth, 592 F.Supp. 1423 (N.D. Ill. 1984), rev'd 770 F.2d 690 (7th Cir. 1985), cert. denied 474 U.S. 1069 (1986), on remand 652 F.Supp. 82 (N.D. Ill. 1986).

THIRD CIRCUIT. The "fundamental defect" issue was also passed over in the earliest Third Circuit case, United States ex rel. Esola v. Grooms, 520 F.2d 830 (3rd Cir. 1975), which also rested cognizance on the "law of the United States" determination, but remanded the case for further development of the record. In United States v. Williams, 615 F.2d 585, 589-590 (3rd Cir. 1980), however, the court suggested that because Congress had provided for dismissal of entire prosecutions for violations of the IAD (see arts. III(d) and IV(e)), it had expressed its intent that those violations be treated as "fundamental defects."[8]

In more recent cases, however, the Third Circuit has attempted to minimize the holding in Williams. In Shack v. Attorney General of Pennsylvania, 776 F.2d 1170, 1172-1174 (3rd Cir. 1985), cert. denied 475 U.S. 1030 (1986), the court found an alleged violation of IAD art. IV(d) (pretransfer hearing) to be noncognizable, specifically distinguishing Williams and Esola. And in Casper v. Ryan, 822 F.2d 1283 (3rd Cir. 1987), the majority held that an alleged art. III(a) trial-in-180-days violation is not cognizable, after taking pains to limit Williams and Esola to trial-before-return violations and to note

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[8]Williams was followed by the district court in Nash v. Carchman, 558 F.Supp. 641, 643 (D. N.J. 1983); and the issue was not addressed in the court of appeals, Nash v. Jeffes, 739 F.2d 878 (3rd Cir. 1984); perhaps explaining why the issue was not presented to this Court in Carchman v. Nash, 473 U.S. 716 (1985).

that in neither case did the court have to determine whether it should actually grant relief. Id. at 1288-1291.[9]

In summary, of the eleven courts of appeals that have arguably considered the issue in or are bound by published opinions, nine would hold that the petitioner's alleged trial-before-return violation would not be considered in the absence of an allegation of actual prejudice to the defense. The Seventh Circuit has not addressed the "fundamental defect" issue, and the Third Circuit is in the process of questioning and narrowing its precedent to the contrary. Resolution by this Court is not necessary in light of the de minimis nature of the split.

B. The Effect of the Split

Perhaps more important than a recital of holdings on the issue is an analysis of the impact the split might have on future habeas corpus cases. The respondents respectfully submit that the present record does not indicate that

> [i]n some Circuits an IAD violation that constitutes an absolute defense under the Agreement can, without more, serve as the basis for habeas relief [while in] others, prejudice must be shown.

Kerr v. Finkbeiner, 474 U.S. 929, 931 (1985) (White, J., joined by Marshall, J., dissenting from denial of certiorari).

In fact, the only effect of the split that is clear thus far is a rather academic difference in analytical approach. As demonstrated above, at least nine courts of appeal would require a showing of prejudice before considering habeas

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[9]Thus the Third Circuit has taken a position exactly opposite the Ninth Circuit, holding that only the time-specific IAD provisions are cognizable. In fact, the Casper majority suggests that violations of the trial-before-return provisions are more egregious than violations of the 120- and 180-day provisions. 822 F.2d at 1290.

corpus relief for a trial-before-return violation.[10] While the Third and Seventh Circuits might consider the merits of an alleged violation before evaluating prejudice, there is little indication that either would actually grant the writ without some showing of a "fundamental defect."

In the Third Circuit this was foreshadowed in Casper v. Ryan, 822 F.2d 1283 (3rd Cir. 1987), which discussed the earlier precedent in the Circuit on the point.

> We believe that Casper confuses two separate issues: the question whether a claim of an IAD violation is cognizable in a section 2254 or 2255 proceeding is a different one than whether the petitioner who can establish only a minor violation is entitled to the writ sought. The binding precedent of our decisions in Williams and Esola is that the IAD is a "law[] of the United States" and that a prisoner is therefore entitled to invoke sections 2254 or 2255 by alleging an IAD violation. However, in Williams, we also stated, "Whether collateral relief is granted may turn on the merits of the alleged violation, but we do not believe the availability of collateral relief should be so determined." 615 F.2d at 590 n. 4 (emphasis in original). In fact, we denied collateral relief to Williams because the method by which he was transferred had not then been held to be governed by the IADA. Id. at 592-593. Similarly, in Esola, . . . [w]e specifically noted that what we were deciding was that a claimed IAD violation stated a claim over which the federal court had jurisdiction to grant habeas corpus relief. [520 F.2d] at 834 & n. 16, 839.

822 F.2d at 1289. While the Casper majority conceded that a "fair reading" of Williams "suggests" that IAD violations would result in habeas relief without a showing of prejudice, 822 F.2d

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[10]As noted above (n. 3 at 5), the Fifth Circuit case of Gibson v. Klevenhagen, 777 F.2d 1056 (5th Cir. 1985), appears not to have even considered the possibility of fundamental defect analysis, and in any event concerned an egregious violation of one of the IAD's time provisions (trial did not occur for two-and-one-half years after the defendant requested trial). We are confident that under Sassoon v. Stynchombe, 654 F.2d 371, 374-275 (5th Cir. 1981), the court would have at least examined the existence of prejudice if the issue had been presented.

at 1289 n. 9, the Casper decision at least opens the door to a finding that the suggestion was dictum.

The situation in the Seventh Circuit is even less clear, since no published court of appeals decision has even reached the point of discussing whether an IAD violation is a "fundamental defect." The fact that the court has examined the merits of such issues does not by itself establish that the Seventh Circuit would grant the writ without a showing of prejudice.

Thus the present state of the issue in the Circuits is that no court of appeals has actually granted habeas corpus relief on a nonprejudicial IAD violation, and only in dicta has the Third Circuit indicated that it might do so in the future. Moreover, there is no question that every court of appeals would authorize habeas relief upon a finding of prejudice. Until the cognizability issue actually results in the uneven granting or denial of habeas relief, there is no need for resolution of the issue by this Court.

III. THE MAJORITY POSITION FOLLOWED BY THE SIXTH CIRCUIT IN THIS CASE IS A CORRECT INTERPRETATION OF THIS COURT'S PRECEDENTS.

In Hill v. United States, 368 U.S. 424 (1962), a § 2255 petitioner sought relief on the ground that he had been denied the opportunity to make a statement at his sentencing hearing, as required by Fed. R. Crim. P. 32(a). This Court stated:

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent

> with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

368 U.S. at 428, quoting from Bowen v. Johnston, 306 U.S. 19, 27 (1939). The Court concluded that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a procedural rule, and in the absence of "other aggravating circumstances." Id. at 429.

This language was relied upon in Davis v. United States, 417 U.S. 333 (1974), in which a § 2255 petitioner sought relief on a claim as to which the law had changed after his conviction. After rejecting the government's assertion that § 2255 applies only to constitutional violations, the Court noted that the inquiry did not end there:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In Hill v. United States [supra], for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

417 U.S. at 346. The same language was relied upon again most recently in a guilty plea case, United States v. Timmreck, 441 U.S. 780, 783-785 (1979).

In Stone v. Powell, 428 U.S. 465 (1976), the Court ruled that habeas corpus relief would not extend to asserted violations of the Fourth Amendment exclusionary rule. The Court noted with approval arguments that habeas corpus will relieve

only from those errors which "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable." 428 U.S. at 479. The Court also referred to the above-quoted language in Hill and Davis. Id. at 477 n. 10.

Even outside the strict setting of the writ of habeas corpus the Court has recognized the importance of a harmless error rule, even where the error is of constitutional dimension. The harmless error doctrine

> recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . ., and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Delaware v. Van Arsdall, 475 U.S. ___, ___, 106 S.Ct. 1431, 1436-1437, 89 L.Ed.2d 674 (1986); Rose v. Clark, ___ U.S. ___, ___, 106 S.Ct. 3101, 3105-3107 (1986).

There is no reason why these principles should not apply equally to alleged violations of the trial-before-return provisions of the IAD. While the IAD promotes salutary policies relating to rehabilitation of prisoners and resolution of pending charges, see United States v. Mauro, 436 U.S. 340, 349-353, 359-360 (1978), these policies are by themselves irrelevant to the determination of whether a prosecution was fundamentally fair. Fasano v. Hall, 615 F.2d 555, 559 n.* (1st. Cir.), cert. denied 449 U.S. 867 (1980); Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert. denied 455 U.S. 910 (1982), United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979).

This is particularly true in trial-before-return cases such as is presented by the instant petition. As noted in Part II above, there is some disagreement over the speedy trial implications of the IAD time provisions. However, the

petitioner in this case has not alleged such a violation, and resolution of that disagreement would not be presented by this case.

In fact, the petitioner has made no allegation of prejudice at trial whatsoever. He has not alleged that his returns to federal custody or the delay in trial impeded his or counsel's investigation and preparation in any way, or that any potential witness was lost to petitioner as the result of the alleged IAD violations. The suggestion that mere technical, pretrial violations of the IAD would justify collateral vacation of the petitioner's armed robbery, burglary, and habitual criminal convictions runs contrary to this Court's precedent cited above, and would trivialize the Great Writ.

Furthermore, the district court (through adoption of the report and recommendation of the magistrate) found that the petitioner did not even suffer "any loss of enjoyment of federal prison programs" or any "sentencing problems" as a result of the shuttling. App. C-19. Two courts of appeals have suggested in dicta that the requisite prejudice might include a showing of prejudice to a defendant's prison status. Mars v. United States, 615 F.2d 704, 707 (6th. Cir.), cert. denied 449 U.S. 849 (1980); Huff v. United States, 599 F.2d 860, 863 (8th Cir.), cert. denied 444 U.S. 952 (1979). This subissue is not presented by this case, and in any event has not developed among the Circuits to the point where a split of authority exists.

CONCLUSION

The petition for the writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief in Opposition has been forwarded by first-class U.S. Mail to Mr. Lionel R. Barrett, Jr., Fifth Floor, 207 Third Avenue North, Nashville, Tennessee 37201 on June 14, 1988.

WAYNE E. UHL
Assistant Attorney General

sonable basis in law and fact. *See, e.g., Trident Marina*, 766 F.2d at 980. Whether we will continue to apply that standard or, instead, require a higher standard, is currently the subject of an *en banc* review by the court in *Riddle v. Secretary of Health & Human Servs.*, 823 F.2d 164 (6th Cir. 1987). However, we do not think it necessary to wait for the *en banc* decision because the position of the United States in this case did not satisfy even the lower standard of reasonableness.

Counsel for the IRS took the position in district court that issuance of the February 28 letter was a mistake which was corrected by the March 27 letters. However, no proof was offered that the earlier letter was, in fact, the product of mistake. No explanation was tendered of what the IRS meant by "administrative error" or how the letter could have been "mistakenly sent" under IRS procedures. There was no basis upon which the district court could conclude that a mistake had occurred; there was only the unsupported assertion of the government in its memoranda of law. In the absence of any evidence or explanation tending to show administrative error and mistake, the district court was warranted in rejecting the IRS's disingenuous argument. Accordingly, the district court did not abuse its discretion in finding that the position of the United States was not substantially justified and in awarding attorney fees to the taxpayer.

The IRS's argument, that the district court improperly awarded fees incurred during periods when the position of the United States was reasonable, is waived since it was not adequately raised below; it was first called to our attention in the government's reply brief.

The order of the district court is affirmed.

Douglas Vincent METHENY, Petitioner-Appellant,

v.

M.C. HAMBY, Warden; and William M. Leech, Attorney General of the State of Tennessee, Respondents-Appellees.

No. 86-5974.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 6, 1987.

Decided Dec. 22, 1987.

State prisoner filed petition for writ of habeas corpus, alleging state had violated trial-before-return provision of Interstate Agreement on Detainers. The United States District Court for the Middle District of Tennessee, Thomas A. Wiseman, Jr., Chief Judge, denied petition, and prisoner appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that state's claimed violation of trial-before-return provision of Interstate Agreement on Detainers was not fundamental defect cognizable in federal habeas corpus proceeding, absent exceptional circumstances.

Affirmed.

Habeas Corpus ⇐45.2(4)

State prisoner's claim that state had violated trial-before-return provision of Interstate Agreement on Detainers was not fundamental defect cognizable in federal habeas corpus proceeding, absent exceptional circumstances. 28 U.S.C.A. §§ 2254, 2255; T.C.A. §§ 40-31-101, 40-31-101, Art. IV(e).

Lionel R. Barrett, Jr. (argued), Nashville, Tenn., for petitioner-appellant.

W.J. Michael Cody, Atty. Gen., Nashville, Tenn., Wayne E. Uhl (argued), for respondents-appellees.

Before JONES and NORRIS, Circuit Judges, and PECK, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge.

Petitioner, Douglas Metheny, while in state custody as the result of felony convictions, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Metheny claimed that he was entitled to a writ since the state of Tennessee had violated the trial-before-return provision of Article IV(e) of the Interstate Agreement on Detainers ("IAD") by returning him to federal custody from state custody without proceeding to trial on the state charges. He appeals the denial of his petition by the district court.

The threshold issue for our determination is whether Metheny's claimed violation of the IAD is cognizable under 28 U.S.C. § 2254. For if his claim is not cognizable, then the district court should be affirmed and we need not reach the other questions raised in the appeal—whether the state actually violated the IAD and, if so, whether Metheny waived any violation.

Metheny claimed that the state violated Article IV(e) of the IAD by returning him to federal custody from state custody on several occasions without proceeding to trial on the state charges. Custody had been obtained by the state for proceedings preliminary to trial, pursuant to writs of habeas corpus *ad prosequendum* directed to federal prison authorities. The federal government is a party to the IAD. Metheny argued that Tennessee, also a party to the IAD, had lodged a detainer against him with federal authorities as contemplated by the Agreement, and that the state's conduct violated Article IV(e):

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Tenn.Code Ann. § 40-31-101 (1982).

In *Mars v. United States*, 615 F.2d 704 (6th Cir.1980), *cert. denied*, 449 U.S. 849, 101 S.Ct. 138, 66 L.Ed.2d 60 (1980), we held that violation of the IAD was not cognizable under 28 U.S.C. § 2255, where a federal prisoner sought postconviction relief on the basis of a violation by the United States of Article IV(e) of the IAD. Mars was serving a prison term in Michigan when the government directed a detainer against him to state corrections officials. After he was indicted on federal charges, he was taken into federal custody pursuant to a writ of habeas corpus *ad prosequendum*, and returned a week later without having been tried. He was subsequently taken into federal custody again to be tried, and was convicted.

Relying upon the Supreme Court's opinion in *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), we held that Mars' claim was not cognizable under 28 U.S.C. § 2255 because the claimed error was not a fundamental defect which inherently results in a complete miscarriage of justice, and did not present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent. 615 F.2d at 707.

Because the error claimed by Metheny rises to no higher a level of seriousness than that claimed by Mars, we must determine if a different standard should be applied in this appeal solely because Metheny is in state custody and seeks federal habeas corpus relief under 28 U.S.C. § 2254.

We discern no reason to apply a higher standard than the one set out in *Davis*, and which we applied in *Mars* to a federal prisoner seeking relief under 28 U.S.C. § 2255. Certainly, considerations of comity and federalism argue for that result. *See Francis v. Henderson*, 425 U.S. 536, 541–42, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976). The Supreme Court has on numerous occasions commented upon similarities between the relief available under 28 U.S.C. § 2255 and habeas corpus, noting that 28 U.S.C. § 2255 provides to the sentencing court the remedies which are available by habeas corpus in the court of the district where the prisoner is confined. *See, e.g., Davis v. United States*, 417 U.S. at 343–44, 94 S.Ct. at 2304; *Hill v. United States*, 368 U.S. 424, 427, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962); *Heflin v. United States*, 358 U.S.

415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959), concurring opinion of five Justices at 421, 79 S.Ct. at 454; *United States v. Hayman*, 342 U.S. 205, 219, 72 S.Ct. 263, 272, 96 L.Ed. 232 (1952). Because 28 U.S.C. § 2255 is "the modern postconviction procedure available to federal prisoners," *Stone v. Powell*, 428 U.S. 465, 479, 96 S.Ct. 3037, 3045, 49 L.Ed.2d 1067 (1976), and therefore offers a wide range of postconviction relief remedies, the relief available to a state prisoner under 28 U.S.C. § 2254 is narrower in scope, since it provides only for habeas corpus relief when custody is in violation of the Constitution, laws, or treaties of the United States. Accordingly, principles of comity dictate that a higher standard of cognizability be required of errors alleged by prisoners who are incarcerated as the result of state court proceedings, especially when one considers that a state prisoner has had available to him state postconviction procedures. *See* 428 U.S. 465, 96 S.Ct. at 3037–38; *Niziolek v. Ashe*, 694 F.2d 282 (1st Cir.1982).

Our conclusion, that Metheny's claim of a state violation of Article IV(e) of the IAD is not cognizable under 28 U.S.C. § 2254, is supported by positions taken by the First Circuit in *Fasano v. Hall*, 615 F.2d 555 (1st Cir.1980), *cert. denied*, 449 U.S. 867, 101 S.Ct. 201, 66 L.Ed.2d 86 (1980), the Fourth Circuit in *Kerr v. Finkbeiner*, 757 F.2d 604 (4th Cir.1985), *cert. denied*, 474 U.S. 929, 106 S.Ct. 263, 88 L.Ed.2d 269 (1985) and *Bush v. Muncy*, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910, 102 S.Ct. 1259, 71 L.Ed.2d 449 (1982), and the Ninth Circuit in *Carlson v. Hong*, 707 F.2d 367, 368 (9th Cir.1983), *but cf. Tinghitella v. California*, 718 F.2d 308 (9th Cir.1983) (violation of IAD time provisions is a cognizable defect). In addition, three other circuits have concluded that, in the absence of exceptional circumstances, violation of the IAD is not cognizable under 28 U.S.C. § 2255: *Edwards v. United States*, 564 F.2d 652 (2d Cir.1977); *Huff v. United States*, 599 F.2d 860 (8th Cir.1979), *cert. denied*, 444 U.S. 952, 100 S.Ct. 428, 62 L.Ed.2d 323 (1979); *Greathouse v. United States*, 655 F.2d 1032 (10th Cir.1981), *cert. denied*, 455 U.S. 926, 102 S.Ct. 1289, 71 L.Ed.2d 469 (1982).

Opinions of other circuits are cited as having arrived at a contrary conclusion. However, the Seventh Circuit, in arriving at that conclusion in *Webb v. Keohane*, 804 F.2d 413 (7th Cir.1986) and *Echevarria v. Bell*, 579 F.2d 1022 (7th Cir.1978), did not undertake the two-step analysis we found mandatory in *Mars*, and which also has been utilized by the First, Second, Fourth, Eighth, Ninth, and Tenth Circuits in the cases cited above. The courts in the Seventh Circuit cases satisfied the first step of the analysis by determining that the IAD is a law of the United States for purposes of federal habeas corpus jurisdiction. However, the Supreme Court has cautioned that the inquiry should not stop there, since not every asserted error of federal law can be raised on a request for habeas corpus relief. Instead, it must be determined that the claimed error is a fundamental defect which inherently results in a complete miscarriage of justice and presents exceptional circumstances where the need for the remedy afforded by habeas corpus is apparent. *Davis v. United States*, 417 U.S. at 346, 94 S.Ct. at 2305. Because the Seventh Circuit did not undertake this second step of the analysis, its opinions properly should be cited as jurisdictional, not cognizability holdings.

The Third Circuit, in *United States v. Williams*, 615 F.2d 585 (3d Cir.1980), did follow the two-step analysis in determining that a violation of Article IV(e) of the IAD is cognizable under 28 U.S.C. § 2255, concluding that such a violation amounts to a fundamental defect. The conclusion in *Williams* is, of course, the opposite conclusion from the one we arrived at in *Mars*, but we continue to believe our conclusion in *Mars* was correct. The *Williams* court could find nothing to warrant treating a claimed IAD error under 28 U.S.C. § 2255 differently than one raised under 28 U.S.C. § 2254, citing its earlier opinion in *Esola v. Groomes*, 520 F.2d 830 (3d Cir.1975). We note that the Third Circuit has recently held that not all violations of the IAD are "fundamental defects" and thus cognizable

under 28 U.S.C. § 2254. *Casper v. Ryan*, 822 F.2d 1283 (3d Cir.1987).

Because we are persuaded that our holding in *Mars* remains sound, and that a lower standard of cognizability should not be applied to claims brought by a state prisoner pursuant to 28 U.S.C. § 2254, we join the clear majority of the circuits in holding that, in the absence of exceptional circumstances, a claimed violation of Article IV(e) of the IAD is not a fundamental defect which is cognizable under 28 U.S.C. § 2254. We therefore affirm the order of the district court.

Edward J. HOLLAND, Jr., Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 86-1647.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 5, 1987.

Decided Dec. 23, 1987.

Rehearing Denied Feb. 17, 1988.

Taxpayer sought redetermination of income tax deficiency. The United States Tax Court, Whitaker, J., determined additions to taxpayer's liability, and appeal was taken. The Court of Appeals found that, while trial court's procedure in calling handwriting expert to determine authenticity of documents presented by taxpayer was somewhat unusual, procedure substantially complied with requirements of Federal Rules of Evidence.

Affirmed.

* The Honorable John W. Potter, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Internal Revenue ⇐4655

Tax court's procedure, in suggesting that government procure handwriting expert witness to examine taxpayer's purported documentation of his claimed deductions, though unusual, was not reversible error where procedure substantially complied with rule of evidence permitting court to call witnesses on its own motion and allowing court to interrogate witnesses; court properly sought expert advice to avoid what might otherwise have been fraud upon court. Fed.Rules Evid.Rules 614(a, b), 706(a), 28 U.S.C.A.

Stanley H. Pitts, Frederick A. Patmon (argued), Detroit, Mich., for petitioner-appellant.

Jean Owens, Acting Counsel, IRS, Michael L. Paup (Lead Counsel), Roger M. Olsen, Tax Div.—Dept. of Justice, Washington, D.C., Charles E. Brookhart, Joan I. Oppenheimer (argued), for respondent-appellee.

Before ENGEL and KENNEDY, Circuit Judges, and POTTER, District Judge.*

PER CURIAM.

This is an appeal from a decision of the United States Tax Court redetermining the income tax deficiency and determining additions to the tax liability of petitioner-appellant Edward J. Holland, Jr. The Tax Court's opinion is published at *Holland v. Commissioner*, 51 T.C.M. (CCH) 172 (1985).

On July 14, 1982 the Internal Revenue Service sent Holland a notice of deficiency for the 1977 and 1978 tax years disallowing a number of claimed deductions. The deficiency was assessed on the basis of Holland's failure to prove that the transactions alleged in those deductions ever occurred. Holland then petitioned the tax court for a redetermination of his tax liability on October 9, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
COLUMBIA DIVISION

RECEIVED FOR ENTRY
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DOUGLAS VINCENT METHENY	)	
	)	
v.	)	NO. 1-84-0003
	)	
LARRY LACK, Warden	)	

ORDER

This cause came on for oral argument on petitioner's objections to the Report and Recommendation of the Magistrate on August 7, 1986. Upon consideration of the briefs filed herein and the arguments of counsel in open Court, this Court is of the opinion that the Magistrate's Report and Recommendation is correct in both law and fact. This Court adopts the Magistrate's Report and Recommendation as its findings of fact and conclusions of law.

The petition is therefore dismissed.

Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

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APPENDIX B

AUG 13 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
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BY DEPUTY CLERK

DOUGLAS VINCENT METHENY	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:84-0003
	)	Judge Wiseman
LARRY LACK, Warden	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

This petition was referred to the Magistrate by the Honorable Thomas A. Wiseman, Jr., Chief Judge, by Order dated December 13, 1984. The Magistrate was directed to prepare a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Counsel was appointed to represent the Petitioner. In light of the length of petitioner's state court proceeding and the complexity and multiplicity of Petitioner's claims, hearings on this petition were continued at petitioner's request on several occasions.

The first hearing was held on September 30, 1985, on the respondent's "procedural default" defense to several of Petitioner's claims.[1] The second hearing was held on January 10, 1986, and focused upon the Petitioner's claim of a violation of the Interstate Agreement on Detainers Act (hereinafter "IAD"), 18 U.S.C. App. Art. I, et. seq. that was conceded by the Respondent to be proper for federal habeas corpus review.

[1]See, Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980) cert. denied 450 U.S. 933, 101 S.Ct. 1395, 67 L.Ed.2d 367 (1981).

For the reasons set forth below, the Magistrate recommends that Metheny's petition for the writ of habeas corpus be denied. The Magistrate finds that no IAD violation is presented under the facts or the applicable law. Further, the Magistrate finds that except for his IAD and certain other claims that were raised on direct appeal, Metheny's claims are barred from federal habeas corpus review due to Metheny's failure to raise these issues on direct appeal of his state court convictions; Metheny's procedural default for his failure to appeal to the Tennessee Supreme Court on the denial of his state post-conviction petition; and Metheny's failure to satisfy the "cause and prejudice" standard in this federal proceeding for these procedural defaults.

II. PROCEDURAL HISTORY OF METHENY'S CLAIMS

Petitioner, Douglas Metheny (hereinafter "Metheny") is a state prisoner who has been convicted of crimes in the federal and state courts. This is Metheny's first application for federal habeas corpus relief[2] challenging his Tennessee convictions of armed robbery, burglary in the first degree and as an habitual criminal. In the hearing, Metheny focused upon his principal claim that was an alleged violation of the Interstate Agreement on Detainers Act, (hereinafter referred to as IAD or Agreement) under 18 U.S.C. Appendix Art. I. et. seq (1985).

Metheny's IAD claim was among the several claims that Metheny presented in his motion for a new trial at the state trial court and in his direct appeal to the Tennessee Court of Criminal Appeals. See, Metheny v. State, 589 S.W.2d 943 (Tenn. Crim. App. 1979). Metheny's application for permission to appeal to the Tennessee Supreme Court was

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[2]Metheny also raised the IAD issue in the United States District Court in Kansas where he was held in federal custody, but that District Court declined to entertain Metheny's habeas petition for lack of exhaustion of state remedies under 28 U.S.C. § 2254(b), in light of Metheny's pending state court proceedings in Tennessee. Metheny v. Day, No. 78-3136, United States District Court for the District of Kansas, Memorandum and Order filed June 12, 1978. Petitioner's Exhibit No. 5.

denied on October 22, 1979. The United States Supreme Court denied certiorari on April 14, 1980. Metheny v. Tennessee, 445 U.S. 967, 100 S.Ct. 658, 64 L.Ed.2d 243 (1980). State post-conviction proceedings were initiated by Metheny with court appointed counsel and post-conviction relief was denied by the state trial court and Court of Criminal Appeals. No appeal of the Court of Criminal Appeals' decision on the denial of post-conviction relief was pursued in the Tennessee Supreme Court. The State concedes that Metheny has exhausted his state remedies on the IAD issue. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 519 (1982).

III. FINDINGS OF FACT

A. The Procedural Default Issues

The bases for the State's "procedural default" defense arises from Metheny's failure to raise certain issues on his direct appeal in the state courts and to file an application for permission to appeal to the Tennessee Supreme Court on the denial of his post-conviction petition by the state trial court and the Court of Criminal Appeals. For these failures, the State contends that Metheny is barred from presenting several of his claims in this federal proceeding under the "Procedural Default" principles.

On his direct appeal of his state convictions, Metheny raised six issues: (1) the alleged IAD violation; (2) the prosecutor's alleged breach of a plea agreement; (3) the trial court's failure to give a criminal trespass charge to the jury; (4) the inclusion of foreign felony crimes, that would be misdemeanors in Tennessee, for jury deliberation on the habitual criminal charge; (5) the prosecutor's alleged non-compliance with the trial court's discovery order on production of Metheny's foreign convictions and the applicable foreign statutes; and (6) the unconstitutionality of the Tennessee habitual criminal statute on its face and as applied. (Court Document No. 12, pp. A-9-10).

In his state post-conviction proceeding, the Court of Criminal Appeals entertained the following claims: (1) alleged ineffective assistance of Metheny's counsel at Metheny's preliminary hearing and trial; and (2) the alleged denial of Metheny's right to represent himself. The Court of Criminal Appeals held to be meritless as previously determined on direct appeal, Metheny's claims of (1) the alleged IAD violation; (2) the alleged failure of the state to honor a plea agreement; (3) the trial court's refusal to give a criminal trespass instruction; (4) an alleged error on consecutive sentencing; (5) the invalidity of certain underlying convictions for Metheny's habitual criminal conviction; (6) the constitutionality of the Tennessee habitual criminal statute; and (7) the State's non-compliance with the trial court's discovery order. (Court Document No. 12, pp. B-41-42). Except as noted above, the Court of Criminal Appeal also found a waiver of any other issues in Metheny's post-conviction petitions that were not raised on direct appeal. (Court Document No. 12, p. B-42).

These latter claims that were not raised on direct appeal and that are raised in this petition include Metheny's allegations of ineffective assistance of counsel at his criminal trial; the state trial court's alleged erroneous refusal to order a psychiatric examination for Metheny's competency to stand trial; an alleged double jeopardy violation for separate convictions of burglary and armed robbery under the same facts; the invalidity of Metheny's habitual criminal conviction because some of Metheny's underlying convictions were obtained without representation by counsel; the alleged lack impartiality of the trial judge; and the improper dismissal of prospective jurors.

Metheny claims that he did not raise certain of these issues at his trial or on direct appeal because of his counsel's decision and counsel's election of which issues to raise at trial and on direct appeal of Metheny's conviction. The other issues that were raised in post-conviction were not raised for the same reasons. (See Court Document No. 28 and Attachments thereto). Metheny's application for permission to appeal the denial of

his post-conviction petition to the Tennessee Supreme Court was not filed allegedly due to the destruction of the Turney Center library from an inmate disturbance. However, Metheny who was informed of the appeal process to the Tennessee Supreme Court and the deadlines therefor, had ample time to apply for an extension of time in which to file his application for permission to appeal to the Tennessee Supreme Court. See, Rule 11(b) Tennessee Rule of Appellate Procedure (Supp. 1985). Metheny is described as an intelligent person who has proceeded pro se in the federal and state courts.

In any event, the crticial procedural default arises from Metheny's failure to raise the issues in this petition on his direct appeal of his state court convictions.

B. Metheny's IAD Claim

From the evidentiary hearing and records in the matter, the Magistrate finds the following facts on Metheny's IAD claim.[3] In January, 1977, Metheny was charged with the crimes of burglary and armed robbery. Metheny was apprehended in Natchez, Mississippi on March 23, 1977, by federal authorities. During this time, Metheny was charged also by federal authorities with the interstate transportation of stolen goods.

On May 11, 1977, a writ of habeas corpus ad prosequendum was issued to the United States Marshal for the Eastern District of Tennessee for Metheny's state court appearance. (See, Respondent's Documents No. 1 and 2). The federal authorities recognized the writ. Metheny had been granted a preliminary hearing by the state court that was held on May 13, 1977.

On May 19, 1977, after the state preliminary hearing, Metheny was convicted on the federal charges and sentenced to Fort Leavenworth Penitentiary. (See Court Document No. ___).

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[3]As noted supra, the Magistrate finds that Metheny had exhausted his IAD claims in the state courts.

A second state court writ of habeas corpus ad prosequendum was issued to the United States Marshal for the Eastern District of Tennessee on June 30, 1977, for Metheny's appearance before the state grand jury. (Court Document No. 37, pp. 4-7). (See, Respondent's Documents No. 4 and 5). Metheny was in federal custody of the Federal Bureau of Prisons in Kansas, but this writ also was honored by the federal authorities.

On July 11, 1977, Metheny was indicted by the Anderson County Grand Jury for armed robbery and burglary in the first degree. (See, Court Document No. 37, pp. 8-16). On July 29, 1977, Metheny appeared in the Criminal Court of Anderson County for an arraignment, a bond determination, and setting of his charges for trial. (See Court Document No. 37, pp. 17-19).

At his arraignment, Metheny and his counsel announced to the Court that they wanted Metheny's trial postponed for several months because Metheny was to undergo surgery at the federal facility. (See Court Document No. 37, pp. 17-19). The state trial court explained to Metheny his right to a speedy trial and thereafter, continued Metheny's trial. Id. at 18. (See also Petitioner's Exhibit No. 3). After the arraignment, Metheny was returned to Federal custody in Leavenworth, Kansas.

On October 24, 1977, an order was entered by the Anderson County Criminal Court Judge reflecting that Metheny's cases appeared on the docket that date and that the cases were still pending before the Court. The Order indicated that the state court Judge continued Metheny's cases for a period of six (6) months after hearing proof on Metheny's request. (See Respondent's Document No. 19). The Order set Metheny's trial on state charges for January 23, 1978. Id. at 19.

On October 28, 1977, Metheny filed a motion to dismiss all of the state charges because he had been brought before the state criminal courts on three separate occasions through a state court's writ of habeas corpus ad prosequendum and he had not been brought to trial in violation of the IAD. Metheny's motion was heard by the state court on January

23, 1978. The state trial court denied the motion, finding that the IAD did not apply to a writ of habeas corpus ad prosequendum. (Court Document No. 37, pp. 22-24).

A third state court writ of habeas corpus ad prosequendum was issued by the Anderson County Court on April 28, 1978, to the United States Marshals in Tennessee and Kansas and the Warden at Fort Lavenworth Penitentiary. (Court Document No. 37, pp. 28-31). This third writ requested custody of Metheny so that he could be available for consultation with his defense counsel on May 2, 1978 and also to be present for trial on May 16 and 17, 1978. (Court Document No. 37, pp. 28-31). Again, the federal authorities recognized the writ. However, due to an apparent delay in trial, Metheny was not transported until July 5, 1978.

The evidence at Metheny's trial was that Metheny entered into the occupied residence of Clyde and Myrtle Welch during the night and by use of a deadly weapon, a pistol, forcibly took and carried away Welch's personal property. At the end of the trial, Metheny renewed his motion to dismiss the charges because of alleged violations of the IAD. The trial court denied the motion and Metheny was convicted of armed robbery, burglary in the first degree, and of being a habitual criminal. (See, Court Document No. 37, pp. 46-49). A motion for a new trial was denied by the trial court.

IV. CONCLUSIONS OF LAW

A. The Procedural Default Issues

In the analysis of a procedural default issue in a federal habeas corpus proceeding, the recent decision of the Court of Appeals for the Sixth Circuit in Maupin v. Smith, No. 84-5446 (filed March 5, 1986), states that the following analysis is required for such issues:

> First, the Court must determine that there is a procedural rule that is applicable to the petitioner's claim and that the petition failed to comply with that rule. . .

> Second, the Court must decide whether the State courts actually enforced the state procedural sanction. . .
>
> Third, the court must decided whether the state procedural forfeiture is an 'adequate and independent state ground upon which the state can rely to close review of a state prosecutional claim [citation omitted]. This question generally will involve an examination of the legitimate state interest behind the state procedural rule behind the procedural rule in light of the federal interest in considering federal claims. . .
>
> Once the court determines that a procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate under [Wainwright v. Sykes, 433 U.S. 72, 87, ___ L.Ed.2d ___, ___ S.Ct. ___ (1977)] that there was 'cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. [citations omitted].

Maupin v. Smith, Slip Opinion at pp. 4-5.

As noted, on the procedural default issues, the Magistrate finds that the appropriate legal standard for the evaluation of this claim is the "cause and prejudice" standard of Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977); Leroy v. Marshall, __ F.2d ___ (6th Cir. 1985). See also Gilbert v. Parke, 763 F.2d 821 (6th Cir. 1985); Shepard v. Foltz, 771 F.2d 962 (6th Cir. 1985). See also, Raper v. Mintzes, 706 F.2d 161 (6th Cir. 1983); Hockenbury v. Sowder, 620 F.2d 111, 115 (6th Cir. 1980) cert. denied 450 U.S. 933, 101 S.et. 1395, 67 L.Ed.2d 367 (1981). Further in Wainwright v. Sykes, supra, the Supreme Court noted that this "cause and prejudice" standard may apply to "decisions of counsel relating to trial strategy." 433 U.S. at 91, n.14, 53 L.Ed.2d 594, 97 S.Ct. 2508. In Reed v. Ross, 467 U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 901 (1980), this suggestion became a holding. In Payne v. Reese, 738 F.2d 118 (6th Cir. 1984), the Court of Appeals affirmed the denial of habeas corpus relief to a state prisoner who failed to raise certain issues in the direct appeal of his conviction.

Except for Metheny's claims of an IAD violation; prosecutorial misconduct; unconstitutional habitual criminal statute; inadequate jury instructions; and effective assistance of trial court counsel claims, the Magistrate finds that Metheny's other claims

are not proper for consideration due to his procedural defaults. In this context, the Magistrate finds that under Reed v. Ross, 467 U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 901 (1984), Metheny has not satisfied the initial showing of adequate cause for his failures either to appeal all of these claims on direct appeal and for his failure after denial of post-conviction petition to apply for an appeal to the Tennessee Supreme Court.

Under Maupin v. Smith, supra, analysis, the Magistrate finds first that the Court of Criminal Appeals' decision on Metheny's post-conviction proceedings clearly found that Metheny waived several issues that had not been raised on direct appeal. This waiver and preclusion is state decisional law and statutory policy. Arthur v. State, 483 S.W.2d 95 (Tenn. 1972); Tenn. Code Ann. § 40-30-112(a)(b), that was found to have been violated by Metheny.

Second, the Magistrate finds that this state procedural rule serves a valid state interest against truncated and piecemeal appellate review of issues and errors that may have occurred in a state criminal trial. Gilbert v. Parke, 763 F.2d 821 (6th Cir. 1985). The federal statutory policy favors full exhaustion of state remedies. 28 U.S.C. § 2254(b). The federal courts, as a policy matter, favor the allowance of the state courts, the initial opportunity to correct constitutional errors and violations of federal rights in state proceedings. Duckworth v. Serrano, 459 U.S. 1, 3, 70 L.Ed.2d 1, 4, 102 S.Ct. 18 (1981). Adherence to this state policy, will protect fully, a state prisoner's federal claim for review by the federal courts.

Finally, Metheny's failure to raise all of these issues, with the noted exceptions on his direct appeal in the State courts, was attributed to his trial counsel. Such attribution does not establish sufficient cause under the cause and prejudice standard. Reed v. Ross, supra.

Of the other exhausted claims, the Magistrate finds that Metheny could not raise effectively on his direct appeal the alleged ineffectiveness of his trial counsel. However, the state court did hear this claim in the state hearing on Metheny's post-

conviction petition. Metheny has presented nothing to dispute or to challenge the accuracy of the state court's post-conviction findings that Metheny had effective assistance of counsel at his trial and upon appeal. (See Court Document No. 12, pp. B-40-47). These factual findings are presumptively correct. Sumner v. Nata, 449 U.S. 539, 546-47, 66 L.Ed.2d 722, 730-31, 101 S.Ct. 764 (1981); 28 U.S.C. § 2254(d). Nothing has been presented to rebut the statutory presumption on the correctness of the state court's determination on Metheny's effective assistance of counsel claim.

Among the claims that were presented to the Court of Criminal Appeals and to the Tennessee Supreme Court on direct appeal, the Magistrate finds that the claim as to the state prosecutor's alleged breech of a plea agreement is proper for federal habeas corpus review. A state prosecutor's withdrawal from a prior settlement agreement does not constitute a constitutional violation of Metheny's rights. Mabry v. Johnson, 104 S.Ct. 2543, 2546-47 (1984). In Mabry, Jutice Stevens writing the majority opinion, opined that a petitioner's acceptance of prosecutor's proposed plea bargain did not create any constitutional rights to have the bargain specifically enforced. Mabry v. Johnson, 104 S.ct. 2543, 2546-47. A plea bargain standing alone is without constitutional significance; in itself, it is a mere executory agreement which until embodied in the judgment of the court does not deprive an accused of any liberty interest or any other constitutionally protected interest. Id. It is only when the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

The Tennessee habitual criminal statute has been constitutional against a federal constitutional challenge. Mullins v. Davis, 517 F.Supp. 7, 8 (E.D. Tenn. 1980), aff'd 661 F.2d 933 (6th Cir. 1981) cert. denied 454 U.S. 1151, 71 L.Ed.2d 306, 102 S.Ct. 1019 (1982). The application of this statute to Metheny does not appear to reach the proportion of the prejudical magnitude in Solem v. Helm, ___ U.S. __, 88 L.Ed.2d 637, 103 S.Ct. 3001

(1983). The Magistrate notes that under Tennessee law, Metheny is eligible for release in thirty (30) years. Tenn. Code Ann. § 40-28-116(b)(10). Finally, the underlying sentences for Metheny's habitual criminal convictions were for serious crimes, to wit, assault with intent to commit rape; armed robbery; and first degree burglary.

Finally, the state trial court's failure to give jury charges on the lesser included offense of criminal trespass does not state a ground for federal habeas corpus relief. O'Guin v. Floz, 715 F.2d 397 (6th Cir. 1983).

The sole exhausted and proper claim for federal habeas corpus review that warrants extensive review is Metheny's IAD claim.

B. The State's Alleged Violation of the Interstate Agreement on Detainers Act (IAD)

Metheny's claim is that his federal rights under the IAD were violated because he was removed from federal custody and transferred to state custody; and returned to federal custody on three separate occasions without a trial on the state indictment. The State does not dispute Metheny's numerous transfers to state custody from federal custody, but asserts that the transfers were pursuant to a state court's writs of habeas corpus ad prosequendum and such writs are not detainers within the meaning of IAD. Thus, there was no IAD violation in Metheny's several transfers to state custody from federal custody as found by the state courts. At the evidentiary hearing, the State argued that Metheny waived his rights under the IAD when his state court trial was continued at Metheny's requests.

Thus, in the Magistrate's view, the question presented is whether the IAD was violated when Metheny was transferred pursuant to the state court's writs of habeas corpus ad prosequendum and if so, whether any such violation warrants issuance of the writ of habeas corpus. To resolve this issue, the Magistrate finds that the legal history of the means of effecting Metheny's transfer to the state court for prosecution must be analyzed. The Magistrate notes at the outset that a violation of the IAD can be a ground for federal

habeas corpus relief as a state prisoner would be held in violation of the laws of the United States as required by 28 U.S.C. § 2254(b). See Carchman v. Nash, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (decided July 2, 1985).

1. The Non-Exclusivity of the IAD as a procedure to obtain state custody of a federal prisoner

Prior to the 1970 enactment of the IAD, the writ of habeas corpus ad prosequendum, that derived from the English system, was employed by federal authorities to obtain custody of a state prisoner for trial in federal court. United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978); Carbo v. United States, 364 U.S. 611, 81 S.Ct. 338, 5 L.Ed.2d 329 (1961). Neither the federal nor state system has abandoned the English system as to the issuance of the ad prosequendum writs. Carbo v. United States, 364 U.S. at 611, 81 S.Ct. 338, 5 L.Ed.2d 329. Further, in Carbo, the Supreme Court declared that the federal writ [suffered] no geographical limitation in its use." However, as to state writs, the Supreme Court stated "[t]hat comity is necessary between sovereignties in the administration of criminal justice in our federal-state system is given full recognition by affording through the use of the writ both respect and courtesy to the laws of the respective jurisdictions." Carbo, 364 U.S. at 620, 81 S.Ct. 538, 5 L.Ed.2d 329. It is important to note that in Carbo, the Supreme Court deemed it unnecessary to decide what would be the effect of a federal writ of habeas corpus ad prosequendum directed to state officials absent cooperation because the state officials in Carbo recognized the writ.

While the writ of habeas corpus ad prosequendum was the method employed by federal courts prior to the IAD, the federal case law reflects that two methods were utilized by state courts to secure a federal prisoner for trial, namely, the state writ of habeas corpus ad prosequendum and a written request filed by the state authority with the United States Attorney pursuant to 18 U.S.C. § 4085. Dickey v. Florida, 398 U.S. 30, 34, 95 S.Ct. 1564, 26 L.Ed.2d 26 (1970); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Ponzi v. Fessenden, 258 U.S. 254, 42 S.Ct. 309, 66 L.Ed. 607 (1922); United

States v. Trigg, 507 F.2d 949 (6th Cir. 1974), cert denied 420 U.S. 938, 95 S.Ct. 1148, ___ L.Ed.2d ___, reh'g denied 420 U.S. 998, ___ L.Ed.2d ___ (1974).

In Ponzi v. Fessenden, Chief Justice Taft, in the opinion of the Court, explained that there was no express authority that authorized the transfer of custody of a federal prisoner to a state court for the purpose of giving evidence in court or for trial in state court, but stated:

> [y]et we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the federal and state courts is vested. The Attorney General is the head of the Department of Justice . . . The trial court is given all the jurisdiction needed to try and hear [the prisoner] by consent of the United States, which only insists on the being kept safely from escape . . . This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.

Ponzi v. Fessenden, 258 U.S. at 254, 42 S.Ct. 309, 66 L.Ed. 607. Thus, it was established as a permissible practice for state courts to issue state writs of habeas ad prosequendum to obtain custody of federal prisoners and such writs were honored by federal authorities as matter of comity to the States.

Over forty (40) years later, in a case arising in a Texas state prosecution of a federal prisoner, a Texas Supreme Court held that Texas courts could not compel a federal prisoner to appear for trial. There, because the prisoner was a federal prisoner and because two separate sovereignties were involved, the Texas state court viewed the issue as a test of the power and authority of the state, unaided by any waiver, permission or act of grace of any other authority to compel the prosecution of the prisoner in the state court. Smith v. Hooey, 393 U.S. 374, 85 S.Ct. 575, 21 L.Ed.2d 607 (1969). Before the Supreme Court, the State conceded that if it had made an effort to secure a federal prisoner's appearance, the federal prisoner would have been produced by federal authorities for trial in state court. Smith v. Hooey, 393 U.S. at 380-81, 85 S.Ct. 575, 21 L.Ed.2d 607.

This assurance was based upon a memorandum that the Solicitor General filed in the case. This memorandum was cited in the Supreme Court's opinion and provided, in pertinent part:

> It is the policy of the United States Bureau of Prisons to encourage the expeditious disposition of prosecutions in state courts against federal prisoners. The normal procedure under which production is effected is pursuant to a writ of ad prosequendum from the state court. Almost invariably, the United States has complied with such writs and extended its cooperation to state authorities. The Bureau of Prisons informs us that removals are normally made by the United States Marshals, with the expense borne by state authorities.

Smith v. Hooey, 393 U.S. 374, 381, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969). Given the memorandum submitted by the Solicitor General, the Supreme Court concluded that a state court's writ of habeas corpus ad prosequendum would have been honored, if the state had sought such a writ. Therefore, the Supreme Court held that a state simply could not ignore a federal prisoner's request to be brought to trial in the state court. Smith v. Hooey, 393 U.S. 374, 381, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).

Smith v. Hooey, supra, also noted that another procedure that could have been employed by the state, to effect the transfer of a federal prisoner to state custody for trial. In a relatively small number of cases, federal prisoners have been produced for state court prosecutions pursuant to 18 U.S.C. § 4085, that provides, in part:

> Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any state or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon presentation of a certified copy of such indictment, information or judgment of conviction, cause such a person, prior to his release, to be transferred to a penal or correctional institution within such State or District. 18 U.S.C. § 4085;

Smith v. Hooey, 393 U.S. at 381, n.13, 89 S.Ct. 575, 21 L.Ed.2d 607. Apparently, 18 U.S.C. § 4085 is not used often because under this federal statutory procedure, differences arise

as to which sovereign is responsible for the expense involved. Smith v. Hooey, 393 U.S. at 381, 21 L.Ed.2d 607, 895 S.Ct. 5151; Trigg v. State, 507 F.2d at 953.

In sum, these decisions establish that the IAD is not the exclusive means of effecting the transfer of a federal prisoner to the state court for purposes of prosecution and the passage of IAD did not abrogate these other custody transfer processes under appropriate rules of statutory construction.[4] "Where Congress has enacted legislation on a particular subject, as it has for a writ of habeas corpus ad prosequendum, subsequent legislation will not be construed to modify, repeal or supplant the legislation, particularly, where both statues serve distinct purposes." Rosencrans v. United States, 165 U.S. 257, 17 S.Ct. 302, 41 L.Ed. 708 (1897). Moreover, because the legislative history of the IAD does not mention the writ of habeas corpus ad prosequendum, in the Magistrate's view, it would be error to conclude that the writ process was incorporated into the IAD or that the use of such writs were modified by the IAD. United States v. Ridgeway, 558 F.2d 357 (6th Cir. 1977); United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977).

Accordingly, the Magistrate finds that the issuance of a state court writ of habeas corpus ad prosequendum, as employed by the State to obtain custody of Metheny from federal custody, was merely one method of effecting Metheny's transfer. Based upon comity considerations, this state court writ is recognized by federal officials, as it were in this case. Thus, no IAD violation is presented.

2. The Tennessee state court writ is not a "detainer" under the IAD.

While the IAD does not define "detainer," the legislative history of the IAD reveals that [a] detainer is a notification filed with the institution in which a person is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction. H.R. Rep. 91-1018, S. Rep. No. 911357, 91 St. Cong. 2d 800, 3 reprinted in

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[4]Prior to United States v. Mauro, 436 U.S. 340, 56 L.Ed.2d 329, 98 S.Ct. 1834 (1978), the Court of Appeals for the Sixth Circuit stated that the IAD was the exclusive means of transferring prisoners between sovereigns. See Trigg v. State of Tennessee, 507 F.2d 949, 952, n.4 (6th Cir. 1974).

1970 U.S. Code & Cong. News 4864, 4865. The IAD contemplates that in addition to notification that the Court with jurisdiction over the prisoner must enter an approval of the request to protect him. Article IV (a).

In United States v. Mauro, 436 U.S. 340, 56 L.Ed.2d 329, 98 S.Ct. 1834 (1978), the Supreme Court held that a federal court's writ of habeas corpus ad prosequendum was not a detainer within the meaning of the IAD because none of the abuses or concerns that prompted the passage of the IAD were present with a federal court's writ of habeas corpus ad prosequendum.

> Because writs of habeas corpus ad prosequendum issued by a federal court pursuant to the express authority of a federal statute are immediately executed, enactment of the Agreement was not necessary to achieve their expeditious disposition. Furthermore, as noted above, the issuance of ad prosequendum writs by federal courts has a long history, dating back to the first Judiciary Act. We can therefore assume that Congress was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word "detainer," it meant something quite different from a writ of habeas corpus ad prosequendum. Contrary to the contention of the Court of Appeals in No. 76-1596, it is not necessary to construe "detainer" as including these writs in order to keep the United States from evading its duties under the Agreement. When the United States obtains state prisoners by means of a writ of habeas corpus ad prosequendum, the problems that the agreement seeks to eliminate do not arise; [footnote omitted], accordingly, the Government is in no sense circumventing the Agreement by means of the writ. We therefore conclude that a writ of habeas corpus ad prosequendum is not a detainer for purposes of the Agreement.

United States v. Mauro, 436 U.S. at 360-61, 56 L.Ed.2d 329, 98 S.Ct. 1834. As noted, the Supreme Court earlier held a federal writ of habeas corpus ad prosequendum has no territorial limitations as to its enforcement. United States v. Carbo, 364 U.S. 611, 5 L.Ed.2d 329, 81 L.Ed.2d 338 (1961).

However, the mere fact that a writ of habeas corpus ad prosequendum is issued for a prisoner does not foreclose the applicability of the IAD. As the Court of Appeals for

this Circuit explained, such a writ issued by a federal court can fall under the IAD under certain circumstances.

> However, where the United States lodged a detainer against a state prisoner, triggering application of the Agreement's provisions, a writ of habeas corpus ad prosequendum will be considered a "written request for temporary custody within the meaning of Article IV and the United States will be bound by the terms of the Agreement.

United States v. Dixon, 592 F.2d 329, 334 (6th Cir. 1979), citing United States v. Mauro, 436 U.S. at 361-62, 98 S.Ct. at 1848, 56 L.Ed.2d 329. The Court of Appeals further held that in such instances where a detainer precedes the federal court's writ of habeas corpus ad prosequendum:

> We agree with appellant that when a state prisoner, subject to a detainer, is taken into federal custody by a writ of habeas corpus ad prosequendum, "for the purpose of permitting prosecution" or pending federal charges, disposition of these changes must precede the prisoner's return to state custody. Failure to do so will result in dismissal of charges against the prisoner, with prejudice.

United States v. Dixon, 592 F.2d at 335. The Court of Appeals noted that a prisoner may waive his rights under Article IV of the IAD. United States v. Dixon, 592 F.2d at 336, n.9.

In contrast to the federal court's writ, a state court writ of habeas corpus has no such unlimited legal effect to produce prisoners beyond the State's territorial limits. As the Court of Appeals explained by citation to Judge Mansfield's dissenting opinion in United States v. Mauro, 544 F.2d 588, 597 (2d Cir. 1976), noting that "[t]he Supreme Court in Mauro, adopted the meaning of Judge Mansfield with respect to the purpose of Article IV(e) of the IAD.

> The purpose of Art. IV is to assure that states which formerly were powerless to obtain production of prisoners held by other states or by the federal government will be able to secure their presence, subject to certain conditions. One of these

conditions is that the receiving state, after obtaining the prisoner merely upon request, will not abuse the privilege by returning him untried since this would have the effect of reinstating and indefinitely prolonging the detainer lodged against him by the receiving state, with its prejudicial effects. (emphasis added).

United States v. Dixon, 592 F.2d at 336.

Although the state's writs of habeas corpus ad prosequendum lack the extraterritorial legal authority of a federal writ, as noted, due to the consistent show of comity by federal officials to such state writs, as a policy matter, such state writs can produce the same effect as a federal writ of habeas corpus ad prosequendum.[5] Moreover, as United States v. Mauro, supra, establishes, the IAD is not the exclusive method to transfer a prisoner between sovereigns for the purpose of criminal prosecution. Thus, if a state writ were issued under a permissible alternative legal process, then no IAD analysis of Metheny's claim is necessary.

The Magistrate's view of United States v. Mauro, supra, is that the appropriate analysis on this IAD claim is not upon the mere labelling of the state process, but rather upon (1) the factual circumstances in which the state writ was issued and (2) whether the abuses sought to be cured by the IAD, were present in the issuance of state writs of habeas corpus ad prosequendum. The critical factual issue on this IAD is whether a Tennessee detainer preceded the state court's writ of habeas corpus ad prosequendum for Metheny's transfer to state authorities. The abuses that were affiliated with the passage of the IAD are: deprivation of the prisoner's ability to take advantage of many of the prisoner's programs aimed at rehabilitation" and "problems in sentencing . . . " posed by unresolved indictments; United States v. Mauro, 436 U.S. at 359, 360, 56 L.Ed.2d 329, 98 S.Ct. 1834.

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[5]Although decided under the federal All Writs Act, 28 U.S.C. § 1651, one Court of Appeals, in dictum, observed that because writs do not pose the problems sought to be cured by IAD, United States v. Mauro, supra, "applies with equal force regardless of the authority under which the writ was issued." United States v. Cogdell, 585 F.2d 1130, 1136 (D.C. Cir. 1978) (writ issued by the District of Columbia Superior Court to a Virginia County Jailor).

In addition, there was a perceived need "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, information or complaints." Id. A further concern was "that prisoners not be shuttled back and forth between penal institutions." 436 U.S. at 361, n.26, 56 L.Ed.2d 329, 98 S.Ct. 1834. See also, Carchman v. Nash, supra, Slip Opinion at p. 13, n.8.

In this case, there was no Tennessee detainer on Metheny prior to the issuance of the first Tennessee court's writ of habeas corpus ad prosequendum. Second, there is no evidence or contention by Metheny of any deprivation of his ability to participate in prison rehabilitation programs by reason of the usage of Tennessee state courts writs. When the state court's writs were issued, the writ was honored promptly by federal officials for purpose of resolving the outstanding Tennessee state charges. Thus, there was no delays in Metheny's state prosecution because of any state official's misconduct. As will be discussed, the only delay in the state's prosecution was at Metheny's request. Although three state court's writs were issued, two of the three that were issued on June 30, 1977 and April 28, 1978, were caused by Metheny's request for his return to federal custody for medical treatment at a federal facility. Significantly, the third writ that was issued on May 11, 1977, was six (6) days prior to when Metheny was convicted on federal charges.

Further, none of these transfers caused any loss of enjoyment of federal prison programs and, in fact, the additional writs were issued to allow Metheny to receive the federal medical care that Metheny requested. There were no sentencing problems caused by these writs. Any attendant shuttling of Metheny between prisons or delay in the disposition of Metheny's state charges were caused by Metheny's decision. In this case, none of the abuses or concerns of the IAD were present in the use of the Tennessee state court writs of habeas corpus ad prosequendum. Thus, the Magistrate finds that under the rationale of United States v. Mauro, the Tennessee state court's use of such writs is not a detainer within the meaning of the IAD.

Moreover, state court writs of habeas corpus ad prosequendum have been held not to be detainers under the IAD. Commonwealth v. Fusano, 375 N.Ed.2d 361, 364 (Mass. App. 1978) and authorities cited therein.

3. Metheny's pre-trial detainee status bars the applicatious IAD.

Assuming that the writ of habeas corpus ad prosequendum is a detainer, (which the Magistrate does not find), Article III of 18 U.S.C. § 1, App. provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against a prisoner, he shall be brought to trial within one hundred and eighty days. . . .

The language in Article III "term of imprisonment" suggests that the IAD is not implicated for pretrial detainees. "Term of imprisonment" has been construed inapplicable to persons being detained for trial who are not serving prison sentences. Roberts v. United States, 548 F.2d at 665 (6th Cir. 1977) cert. denied, 431 U.S. 920, 97 S.Ct. 2188, 53 L.Ed.2d 232. See also, United States v. Dobson, 585 F.2d 55 (1978), cert. denied, 439 U.S. 899, 99 S.ct. 264, 58 L.Ed.2d 247 (1978); United States v. Evans, 423 F.Supp. 528 (S.D. N.Y. 1976) aff'd without op., 557 F.2d 56 (2nd Cir. 1977); Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977), cert. denied, 436 U.S. 946, 98 S.ct. 2858, 56 L.Ed.2d 788 (1977); United States v. Harris, 566 F.2d 610, 612-13 (8th Cir. 1977).

The Court of Appeals for the Sixth Circuit has analyzed the IAD and concluded that the IAD has two purposes: (1) to minimize interference with participation in programs of prisoner treatment and rehabilitation of persons serving sentences in one jurisdiction who have charges pending against them in another jurisdiction and (2) to expedite trial of such pending charges. United States v. Roberts, 548 F.2d 665 (6th Cir. 1977). Thus, the IAD is applicable only to a prisoner who has been sentenced for a term of imprisonment and who participates or is eligible to participate in programs of treatment

and rehabilitation that would be obstructed by numerous absences in connection with successive proceedings related to pending charges in other jurisdiction(s). United States v. Roberts, 548 F.2d at 671.

Metheny was not sentenced on federal charges as of May 11th. Thus, the IAD was not triggered by the issuance of the first state court writ even if the Magistrate assumes that the writ issued on May 11, 1977, was a detainer.

4. Metheny's Waiver of the IAD protections

Assuming the IAD is applicable, the Magistrate finds that the second state court writ of habeas corpus ad prosequendum issued on June 30, 1977, was the first writ that possibly could have triggered the IAD. The purpose of the writ was to obtain temporary custody of Metheny for a grand jury appearance. The Magistrate finds that on July 29, 1977, when Metheny and his counsel appeared in open court on the writ of habeas corpus ad prosequendum for arraignment, the setting of bond and also for the setting of the cases for trial and Metheny requested that his trial be continued so that he would be able to undergo surgery. The state trial court granted Metheny's request. Thus, Metheny's request caused the issuance of the third state court writ on April 30, 1978.

The Magistrate finds that if the second writ were deemed a detainer, Article III of the IAD requires that: (1) trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance; and (2) the receiving State is required to bring the prisoner to trial on the outstanding charge before returning him to the State in which he was previously sentenced. If trial is not had prior to the prisoner's being returned to the original place of imprisonment, the court shall enter an order dismissing the same with prejudice. 18 U.S.C. App. § 2, Article IV(e).

The Court of Appeals for the Sixth Circuit has ruled that a prisoner may waive his rights under the IAD. In United States v. Eaddy, 595 F.2d 341, 344 (6th Cir. 1979), the

[redacted]

Court of Appeals stated that despite the mandatory language of Article IV, created by the Agreement are for the benefit of the prisoner and exist for his and are personal to him. Eaddy, 595 F.2d at 344 citing United States v. Ford, 55 (2nd Cir. 1977). Furthermore, the Court opined:

> [I]n all cases where a prisoner is aware of and understands the provisions of Article IV, as well as his right thereunder, a prisoner can waive those rights, so long as the waiver is voluntary. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). We also hold that substantive rights accorded to a prisoner under Article IV may be waived even though the prisoner is not aware of those rights, where there is an affirmative request to be treated in a manner contrary to the procedures prescribed by Article IV(c) or (e) (emphasis).

United States v. Eaddy, 595 F.2d at 344.

The Magistrate finds that on June 28, 1977, Metheny made an affir knowledgeable request not to have his cases set for trial until after he had surgery. For this reason, the Magistrate finds that Metheny waived his rights IAD. Therefore, there was no violation of IAD in this case even if the state co deemed a "detainer" under the IAD.

V. RECOMMENDATIONS

For all of the above mentioned reasons, the Magistrate recomm Metheny's application for writ of habeas corpus be denied. Pursuant to Rule 8(b Federal Rules Governing Section 2254 cases in the United States District Cour has ten (10) days from the date of receipt of this Report in which to file any ob may have to the Magistrate's Report and Recommendation, with the District Cou

Entered this the 21st day of March, 1986.

WILLIAM J. HAYNES, JR.
United States Magistrate

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problems are inherent in the process of relitigation authorized by the 1978 amendment to § 40-3411. However, the legislature has expressed a clear intention that these risks be balanced against a concern for minimizing injustice, and has therefore provided for relitigation in limited circumstances.

We nevertheless find that the judgment dismissing the petition in this case should be affirmed. When confronted by a § 40-3411 Request, the trial judge must make the following findings:

(1) whether or not there now exists subsequently or newly discovered evidence (even though related to matters previously litigated),

(2) which might have resulted in a different judgment had it been presented at trial,

(3) but which was not presented at that time through no fault of the defendant.

As a threshold matter, the post-trial statement signed by Mr. Longmire does not qualify as "subsequently or newly discovered evidence," because the substance of the statement was known to the defendant and was fully explored at trial. Simply put, it cannot be said to be "newly" discovered, and thus no basis exists for a hearing to determine the remaining questions prerequisite to the issuance of a writ, *i. e.*, whether the evidence, if presented, would have produced a different result, and whether the defendant should be charged with its omission into evidence. The petition should have been dismissed on this basis.

The judgments of conviction in the Trial Court are hereby affirmed.

O'BRIEN and CORNELIUS, JJ., concur.

Douglas Vincent METHENY, Appellant,

v.

STATE of Tennessee, Appellee.

Court of Criminal Appeals of Tennessee, at Knoxville.

June 12, 1979.

Cert. Denied Oct. 22, 1979.

Defendant was convicted in the Criminal Court, Anderson County, Roland Prince, J., of armed robbery, burglary in the first degree and being an habitual criminal, and he appealed. The Court of Criminal Appeals, Cornelius, J., held that: (1) writ of habeas corpus ad prosequendum was not encompassed in the definition of "detainer" for purposes of invoking provisions of Interstate Agreement on Detainers; (2) evidence did not support an instruction on criminal trespass as a lesser included offense of first-degree burglary; and (3) habitual criminal statute was not unconstitutional on its face or as applied to defendant.

Affirmed.

1. Extradition and Detainers ⇐32

Writ of habeas corpus ad prosequendum was not encompassed in the definition of "detainer" for purposes of invoking provisions of Interstate Agreement on Detainers. T.C.A. § 40-3901 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐273.1(2)

Where a plea agreement is accepted and breached, one of two results ordinarily follows, depending on circumstances: either specific performance of the agreement is directed, or the parties are restored to the status existing immediately before plea was entered.

3. Criminal Law ⇐1031(4)

Although trial judge erred in failing to allow defense counsel to complete the rec-

ord with regard to enforceability of a plea agreement, defendant's failure to except to judge's ruling precluded matter from being raised on appeal, particularly where defendant failed to make an affirmative showing of irremediable prejudice.

4. Criminal Law ⇐795(1)

Evidence did not support an instruction on criminal trespass as a lesser included offense of first-degree burglary.

5. Criminal Law ⇐1210

Where indictment under which defendant was convicted charged defendant with armed robbery, burglary and with being an habitual criminal, trial court's order, which required defendant's sentences for first-degree burglary and for armed robbery to run consecutively to a federal sentence which defendant was serving and to run consecutively as to each other, was not improper.

6. Criminal Law ⇐1202(1)

Adjudication of defendant as an habitual criminal could be based upon defendant's Georgia conviction for taking goods of a value in excess of $100, an Iowa conviction for assault with intent to rape and an Iowa conviction for receiving stolen property. T.C.A. §§ 39-4203, 40-2712, 40-2801.

7. Criminal Law ⇐1202(7)

Defendant, who was charged with being an habitual criminal, could not claim error as result of State's failure to disclose certified copies of defendant's convictions and certified statutes from out of state upon which prosecution intended to rely where record did not reveal a motion or an order for disclosure of the evidence of the convictions alleged in the indictment and where defendant failed to establish that he was prejudiced by not seeing the certified documents.

8. Criminal Law ⇐1202(3)

In defendant's habitual criminal trial, trial court did not abuse its discretion in prohibiting defendant from testifying on irrelevant matters.

9. Criminal Law ⇐1213

Habitual criminal statute does not impose cruel and unusual punishment. T.C.A. § 40-2801; U.S.C.A.Const. Amend. 8.

10. Criminal Law ⇐1202(4)

It was not error for jury that convicted defendant of the triggering offense to determine defendant's status as an habitual criminal. T.C.A. § 40-2801.

11. Criminal Law ⇐1206(2), 1211

Life sentence imposed pursuant to habitual criminal statute upon conviction of triggering offense of armed robbery was not excessive and disproportionate to underlying offenses, which also included convictions for assault with intent to rape and taking goods of a value in excess of $100. T.C.A. § 40-2801; U.S.C.A.Const. Amend. 8.

Ann Mostoller, Oak Ridge, for appellant.

William M. Leech, Jr., Atty. Gen., Robert A. Grunow, Asst. Atty. Gen., Nashville, Mike Lawson, Asst. Dist. Atty. Gen., Clinton, for appellee.

OPINION

CORNELIUS, Judge.

Appellant, Douglas Vincent Metheny, is before this court on three cases appealed from the Criminal Court of Anderson County. The cases are consolidated in this opinion, as they obviously should be.

Appellant was indicted as follows:

1. Armed Robbery, January 8, 1977, of Clyde and Myrtle Welch;

2. Burglary in the first degree, January 8, 1977, by breaking and entering residence of Clyde and Myrtle Welch;

3. Being an Habitual Criminal, having on January 8, 1977 committed the offense of armed robbery on the persons of Clyde and Myrtle Welch when he was then a person who had been sever. times convicted within the purview of Tennessee Code Annotated § 40-2801.

On July 26, 1978, a jury found appellant guilty of burglary in the first degree and fixed his punishment at not less than five nor more than fifteen years in the state penitentiary and guilty of armed robbery with his punishment fixed at fifteen years in the state penitentiary. On the same date, at a bifurcated hearing, the same jury found appellant to be an habitual criminal as charged in the third indictment. It is from these three convictions the appellant is now before us assigning a total of six errors on the part of the trial court.

[1] Appellant's first assignment of error is that the State violated the Interstate Agreement on Detainers, Section 40-3901, et seq. An examination of this record does not demonstrate that the State of Tennessee caused a detainer to be lodged with the federal authorities for the appellant.[1] The appellant's counsel filed and argued a motion to dismiss the indictments because appellant had been brought before the court three separate times through a writ of habeas corpus ad prosequendum and returned to federal custody without a trial or final determination of his cases. The trial judge heard the motion, took the matter under advisement and later entered an order denying the motion which included a thorough opinion.

The trial judge held that the compact agreement is not the exclusive means of transfer of prisoners between jurisdictions, and a writ of habeas corpus ad prosequendum does not come under the definition of "detainer" for the purposes of invoking the provisions of the agreement. *United States v. Scallion*, 548 F.2d 1173 (5th Cir.). The United States Supreme Court reversed an opinion of the Court of Appeals for the Second Circuit which held that a writ of habeas corpus ad prosequendum was a detainer entitling the State inmate to the protection provided in Article IV and specifically to a trial before his return to the state institution. *United States v. Mauro*, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978). The Supreme Court clearly held the writ of habeas corpus ad prosequendum not to be a detainer within the meaning of the agreement and thus does not trigger the application of the agreement. *Mauro*, supra. This assignment of error is overruled.

[2] Appellant's second assignment of error is that the District Attorney failed to honor a plea agreement entered into by the parties, which plea agreement the court must honor. In the case of *James Douglas Orange v. State*, 1976, O'Brien, J., James Douglas Orange relied upon *Santobello v. United States*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 to enforce a plea agreement, as does this appellant. In *Santobello*, the statement was made that the courts will specifically enforce agreements made by the government in the process of plea bargaining *after the guilty plea is accepted by the court*. No authority was offered in *Orange*, supra, nor has any been offered herein, to support the appellant's position that a plea bargaining agreement will be enforced prior to its acceptance by the court. Where an agreement is accepted and breached, one of two results ordinarily follows, depending on the circumstances: (1) either specific performance of the agreement is directed, or, (2) the parties are restored to the status existing immediately before the plea was entered.

[3] The bill of exceptions (line 24, page 28 through line 5, page 29) reflects that appellant's counsel attempted to take up with the trial judge the question of the plea bargain agreement but she did not succeed. We think the trial judge was in error not to allow appellant's counsel to complete the record on this point. However, appellant's counsel did not except to the trial judge's ruling. It has long been the rule of this court that errors to which no objections are made and exception taken in the court below cannot be raised on appeal. *Ekell v.*

1. Upon hearing appellant's motion, the trial judge found the District Attorney had not filed a detainer within the meaning of Article IV(c) of the agreement.

State, 413 S.W.2d 678, 681 (Tenn.). Furthermore, appellant has not demonstrated the loss of any trial tactic or fundamental right as a result of this miscarriage of negotiations. In *Orange*, supra, this court adopted the comment of a Maryland court in *Wynn v. State*, 22 Md.App. 165, 322 A.2d 564:

> "We cannot overlook the fact that a prosecutor has a profound obligation to society. If prior to the consummation of a plea bargain he foresees that it might endanger society, he has not merely the right, but the responsibility, to withdraw from the agreement. Plea bargains should not be specifically enforced in the absence of affirmative evidence of prejudice arising from the bargain, which prejudice cannot be remedied by permitting the defendant to withdraw his plea and commence anew. Only upon a finding of such inexpiable prejudice should a defendant be permitted the option of specific performance by the trial court."

There being no affirmative showing of irremediable prejudice to appellant, we overrule this assignment of error.

[4] Appellant's third assignment of error addresses the denial of a request for an instruction on criminal trespass as a lesser included offense of first degree burglary and the ordering of the sentences to run consecutively. This record does not support the need for an instruction upon the law of criminal trespass. *Howard v. State*, 578 S.W.2d 83 (Tenn.1979; recommended for publication).

[5] The trial court ordered the sentences for first degree burglary and for armed robbery to run consecutively to the federal sentence appellant is serving and to run consecutively as to each other. The trial judge ruled this was necessary "in order to protect the public from further criminal conduct by the defendant, whom the court finds to be both a persistent offender and a multiple offender as judicially defined." We do not find this ruling of the trial judge to conflict with the holdings in *Greer v. State*, 539 S.W.2d 855, 860 (Tenn.Cr.App.). This ruling also is supported by *Gray v. State*, 538 S.W.2d 391, 393 (Tenn.). The indictment under which appellant was convicted charged appellant with being an habitual criminal, which is a status, and did not charge an independent crime to the armed robbery offense. Upon being found guilty under the armed robbery indictment, the "trigger was pulled" for the habitual criminal indictment, the conviction thereunder enhancing the armed robbery sentence. *Harrison v. State*, 394 S.W.2d 713 (Tenn.); *Evans v. State*, 571 S.W.2d 283 (Tenn.). The charging procedure followed in this case is the same as in *State v. Hudson*, 562 S.W.2d 416 (Tenn.):

> "The defendant was separately indicted and convicted in one trial of the following offenses and received the punishment indicated."

Our Supreme Court approved the procedure of revising the judgments to comply with the law. The trial judge did this in his order entitled "Verdict of the Jury and Order of the Court."[2] This assignment of error is overruled.

[6] Appellant's fourth assignment of error attacks the introduction of proof of certain crimes which were felonies but which would have been misdemeanors in Tennessee. Appellant says it was further error to instruct the jury that any crime which is a felony in another state must be considered as a felony for the purposes of conviction under the habitual criminal statute in Tennessee. The State's basis for proof of appellant's status as a habitual criminal is found upon the following convictions:

1. Taking goods of a value in excess of $100.00, Peach County, Ga. (Compare T.C.A. § 40-2712 and T.C.A. § 39-4203);
2. Assault with intent to rape, State of Iowa (Compare T.C.A. § 39-605);

2. See T.R. 61, page 54

3. Receiving stolen property, State of Iowa (Compare T.C.A. § 40-2712 and *Odell Smith v. State*, C.C.A. at Jackson, February 1, 1979, Tatum, Judge).

We think the requisite criteria to support the status of having three prior convictions against him, as required under Section 40-2801 T.C.A., has been properly met. *Crafton v. State*, 545 S.W.2d 437, 439 (Tenn.).

Appellant's counsel in the caption to this assignment of error complained conjunctively as to the trial judge's instructions to the jury. We are cited no authority to support this part of the assignment and it is without merit. *Rockett v. State*, 475 S.W.2d 561 (Tenn.Cr.App.). This assignment of error is overruled.

[7] Appellant's fifth assignment of error relates to the trial judge's allowing the introduction of certified copies of appellant's conviction and the certified statutes from out of state. It is alleged that the District Attorney failed to comply with defendant's motion for copies of such documents before trial.

The habitual criminal indictment in this case contains all the information required under Section 40-2803 T.C.A. The thrust of appellant's assignment centers upon the difference between having the information in fact and having certified information. Appellant states the complaint as follows:

> "There was no reason for the State to fail to show defense counsel the documents they intended to rely upon, particularly when they had willingly produced *similar* documents earlier; in fact, failure to provide defense counsel with proper documents compounded the error in that it led defense counsel to believe that they knew what documents would be introduced at trial."

The bill of exceptions shows that the District Attorney answered the question by stating he had only shortly before trial received the certified copies. The trial judge overruled appellant's objection and allowed this evidence. The record does not reveal a motion or an order for disclosure of evidence of the convictions alleged in the indictment.[3] No effort was made in the appellant's brief to explain how he was prejudiced by not seeing the certified documents. *Anglin v. State*, 553 S.W.2d 616, 622 (Tenn. Cr.App.). This assignment of error is overruled.

[8] Appellant's sixth assignment of error is that the habitual criminal statute is unconstitutional on its face and as applied in this case. He raises three points. The first point is that no evidence may be presented to the jury concerning the nature of the crime committed by the defendant or of his character reputation, social-economic standing. This court held in *Delay v. State*, 563 S.W.2d 905, 907 (1977) (Cert. denied Feb. 20, 1978, pet. rehear. denied April 3, 1978):

> "[7] Johnson (a co-defendant) complains that the court refused his offer of proof. During the habitual criminal trial, he sought to show by his wife his present good behavior. *This was not error. The only issue at this trial* was the validity of Johnson's prior convictions."

In the instant case the trial judge allowed the appellant to take the stand over the State's objection. During his testimony the State raised several specific objections which were sustained. However, the trial judge clearly advised appellant's counsel that he was not cutting off appellant's right to testify [on relevant matters]. We find no abuse of discretion on the part of the trial judge.

[9] The next issue is that the jury had no leeway to enhance the sentence without automatically granting a life sentence without parole, and that this amounts to a form of cruel and unusual punishment. Our Supreme Court, in 1975, in an unanimous opinion, authored by [then] Justice Henry, clearly answered this issue against appellant.

3. Motion for discovery, filed August 3, 1977, clearly did not cover such a request. We are unable to find an order covering the three items covered in this motion (T.R. # 61, page 13).

Pearson v. State, 521 S.W.2d 225 (Tenn.) (citing with approval this court's opinion of *Hobby v. State*, 499 S.W.2d 956 (Tenn.Cr. App.). Appellant says in effect that the above cases have been compromised by *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The lead opinion of *Woodson*, supra, covers six points all inter-locked to capital punishment, the death penalty, and who would live and who would die. It does not treat the subject of *automatic sentences*, but rather the subject of *automatic death penalties*.

"This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of conviction . . . ." *Williams v. New York*, 337 U.S. 241, 247, 93 L.Ed. 1337, 69 S.Ct. 1079, 1083 (1949). *Woodson v. North Carolina*, supra.

This court has traversed this issue since *Woodson v. North Carolina*, supra, and again found the habitual criminal statute does not impose cruel and unusual punishment. *Glasscock v. State*, 570 S.W.2d 354, 355 (Tenn.Cr.App.), cert. denied Aug. 28, 1978.

[10] Appellant next says it is error to require the jury that convicts of the triggering offense to determine the defendant's status of being an habitual criminal. We think appellant has misconstrued *Bishop v. State*, 563 S.W.2d 913 (Tenn.Cr.App.)

"Even though this assignment of error is not properly before this court, we note that the jurors had already been qualified before hearing the burglary evidence and find no merit to the appellant's contention that they should be qualified again before hearing the habitual criminal evidence. The same jury is required to hear both facets of the bifurcated proceedings, and was found initially to be qualified. This assignment is overruled."

[11] Appellant contends that the habitual criminal statute is unconstitutional, because as applied in the instant case the life sentence was so excessive and disproportionate to the underlying offenses that it constituted a violation of the Eighth Amendment protection against cruel and unusual punishment. Appellant relies upon the rationale of *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973) and *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978).

In *Elnorris Smith v. State of Tennessee*, at Jackson, opinion filed Oct. 18, 1978, Duncan, J., another panel of this court found:

"The underlying offenses of *Hart* and *Rummel* can hardly be equated with the defendant's underlying offenses in the present case. The same thing must be said in comparing the *Hart* and *Rummel* triggering offenses with the defendant's triggering offense."

We adopt the comparison test of *Smith*, supra. The present case has underlying offenses of assault with intent to rape and taking goods of a value in excess of $100.00, as well as a triggering offense of armed robbery and the life sentence given was not excessive and disproportionate to the underlying offenses. This assignment of error is overruled.

We affirm the judgments below.

DWYER and BYERS, JJ., concur.

Billy HULL, Appellant,

v.

STATE of Tennessee, Appellee.

Court of Criminal Appeals of Tennessee, at Knoxville.

June 28, 1979.

Permission to Appeal Denied by Supreme Court Sept. 4, 1979.

Petitioner appealed from a judgment of the Criminal Court, Hamilton County,